

UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION

JEREMY MILLIRON,

No. 03:11-cv-00656-HU

Plaintiff,

**FINDINGS AND  
RECOMMENDATION**

vs.

CAROLYN W. COLVIN, Acting  
Commissioner of Social Security,

Defendant.

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Attorney for Plaintiff

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Attorneys for Defendant

1 HUBEL, Magistrate Judge:

2 Before the Court is Plaintiff Jeremy Milliron's ("Plaintiff")  
3 unopposed motion for attorneys' fees pursuant to 42 U.S.C. §  
4 406(b).<sup>1</sup> Plaintiff's counsel seeks approval of attorneys' fees in  
5 the amount of \$12,612.50—which represents 25% of the past due  
6 benefits awarded to Plaintiff—less \$6,100.00 in attorneys' fees  
7 previously awarded under the Equal Access to Justice Act ("EAJA"),  
8 28 U.S.C. § 2412. Based on the factors established in *Gisbrecht v.*  
9 *Barnhart*, 535 U.S. 789 (2002), and explained in *Crawford v. Astrue*,  
10 586 F.3d 1142 (9th Cir. 2009) (en banc), the Court recommends  
11 granting Plaintiff's unopposed motion (Docket No. 18) for § 406(b)  
12 fees.

### 13 I. BACKGROUND

14 Plaintiff filed the present action on May 31, 2011, seeking  
15 judicial review of the Commissioner of Social Security's  
16 ("Commissioner") denial of his applications for disability  
17 insurance benefits ("DIB") and supplemental security income ("SSI")  
18 benefits under Titles II and XVI of the Social Security Act. This  
19 is the second time Plaintiff has sought judicial review of the  
20 Commissioner's denial of his applications. The first proceeding  
21 was filed by Plaintiff's counsel of record on October 29, 2007, and  
22 it was assigned to Judge Anna Brown. Plaintiff's counsel obtained  
23 a stipulated remand shortly after filing a twenty-page opening  
24 brief on August 14, 2008, wherein he challenged many (if not all)

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26  
27 <sup>1</sup> Plaintiff's counsel indicates that the motion is unopposed  
28 in the body of the first paragraph. The Commissioner also filed a  
response brief stating that she has given substantive consideration  
to the merits of the fee request and found no basis to object.

1 of the issues addressed in the district court's agreed-upon remand  
 2 order. On February 11, 2009, the district court entered an order  
 3 approving Plaintiff's counsel's unopposed application for EAJA fees  
 4 in the amount of \$4,900.00.<sup>2</sup>

5 When Plaintiff returned to federal district court for a second  
 6 time on May 31, 2011, after further unsuccessful proceedings before  
 7 an Administrative Law Judge ("ALJ"), his counsel negotiated with  
 8 the Commissioner and obtained a stipulated remand without filing  
 9 any briefing. It's clear from the district court's November 29,  
 10 2011 remand order, however, that many of the issues raised by  
 11 Plaintiff's counsel in the first proceeding remained outstanding.  
 12 On February 28, 2012, Judge Hernandez entered an order approving  
 13 Plaintiff's counsel's unopposed application for EAJA fees in the  
 14 amount of \$1,200.00.<sup>3</sup> A little over two years later, after  
 15 receiving a favorable outcome on the second remand (an award of  
 16 \$50,450.00 in past due benefits), Plaintiff's counsel filed the  
 17 unopposed motion for § 406(b) fees which is now before the Court.

## 18 **II. LEGAL STANDARD**

### 19 **A. Section 406(b)**

20 In Social Security cases, attorney fee awards are governed by  
 21 § 406(b), which provides in pertinent part:

22 (1)(A) Whenever a court renders a judgment favorable to  
 23 a claimant under this subchapter who was represented  
 24 before the court by an attorney, the court may determine

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25 <sup>2</sup> Plaintiff's counsel submitted detailed time records  
 26 indicating that he and another attorney spent a combined total of  
 28.7 hours on the case before Judge Brown.

27 <sup>3</sup> Plaintiff's counsel submitted detailed time records  
 28 indicating that he spent a total of 7.30 hours litigating the  
 second proceeding.

1 and allow as part of its judgment a reasonable fee for  
2 such representation, not in excess of 25 percent of the  
3 total of the past-due benefits to which the claimant is  
entitled by reason of such judgment . . . .

4 42 U.S.C. § 406(b)(1)(A).

5 **B. Controlling Precedent**

6 *Gisbrecht* concerned fees awarded under § 406(b). *Gisbrecht*,  
7 535 U.S. at 792. Specifically, the Supreme Court addressed the  
8 question, which sharply divided the Federal Courts of Appeals:  
9 "What is the appropriate starting point for judicial determinations  
10 of a reasonable fee [under § 406(b)] for representation before the  
11 court?" *Id.*

12 For the purposes of the opinion, the Supreme Court  
13 consolidated three separate actions where the District Court, based  
14 on Circuit precedent, declined to give effect to the attorney-  
15 client fee arrangement. *Id.* at 797. Instead, the District Court  
16 employed a lodestar method whereby the number of hours reasonably  
17 devoted to each case was multiplied by a reasonable hourly fee.  
18 *Id.* at 797-98. The *Gisbrecht* court concluded that § 406(b)  
19 requires a court to review the contingent-fee arrangement, to  
20 assure they yield reasonable results. *Id.* at 807. Congress  
21 provided one boundary line: contingent-fee agreements are  
22 unenforceable if they exceed 25% percent of past-due benefits. *Id.*  
23 Within that 25% boundary, however, "the attorney for the successful  
24 claimant must show that the fee sought is reasonable for the  
25 services rendered." *Id.*

26 Courts are instructed to first test the contingent-fee  
27 agreement for reasonableness. *Id.* at 808. An award of § 406(b)  
28 fees can be appropriately reduced based on (1) the character of the

1 representation; (2) the results achieved; (3) when representation  
2 is substandard; (4) if the attorney is responsible for delay; and  
3 (5) if the benefits are large in comparison to the amount of time  
4 counsel spent on the case. *Id.* The claimant's attorney may be  
5 required to submit a record of hours spent representing the  
6 claimant and a statement of the lawyer's normal hourly billing  
7 charge for noncontingent-fee cases in order to aid the court's  
8 assessment of reasonableness. *Id.* Lastly, the *Gisbrecht* court  
9 added that "[j]udges of our district courts are accustomed to  
10 making reasonableness determinations in a wide variety of contexts,  
11 and their assessments in such matters, in the event of an appeal,  
12 ordinarily qualify for highly respectful review." *Id.*

13 In *Crawford*, the Ninth Circuit reviewed three consolidated  
14 appeals and determined that, in each case, the district court  
15 failed to comply with *Gisbrecht's* mandate. *Crawford*, 586 F.3d at  
16 1144. In each of the three cases, the claimant signed a written  
17 contingent-fee agreement whereby the attorney would be paid 25% of  
18 any past-due benefits awarded. The *Crawford* court noted that  
19 contingency-fee agreements, which provide for fees of 25% of past-  
20 due benefits, are the norm for Social Security practitioners. *Id.*  
21 at 1147. However, since the Social Security Administration ("SSA")  
22 "has no direct interest in how much of the award goes to counsel  
23 and how much to the disabled person, the district court has an  
24 affirmative duty to assure the reasonableness of the fee is  
25 established." *Id.* at 1149. Performance of that duty begins by  
26 asking whether the amount of the fee agreement need be reduced. *Id.*

27 At the outset, the attorneys in *Crawford* requested fees  
28 representing 13.94%, 15.12% and 16.95% of past-due benefits, *id.* at

1 1145-47, because they felt "the full 25% fee provided for by their  
 2 fee agreements would be unreasonable." *Id.* at 1150 n.8. If the  
 3 attorneys had received the 25% fee provided for by their  
 4 agreements, they would have been awarded fees ranging from  
 5 \$19,010.25 to \$43,055.75. *Id.* at 1150. Even so, the district  
 6 courts still reduced the contracted fees by between 53.7% and  
 7 73.30%, which produced fees that represented 6.68% to 11.61% of the  
 8 past-due benefits. *Id.* All three decisions were reversed because  
 9 they relied on lodestar calculations and rejected the primacy of  
 10 lawful attorney-client fee agreements. *Id.* That is to say, the  
 11 district courts erroneously began with a lodestar calculation by  
 12 comparing the lodestar fee to the requested fee award. *Id.* As the  
 13 Ninth Circuit recognized:

14 In *Crawford*, for example, the district court awarded  
 15 6.68% of the past-due benefits. From the lodestar point  
 16 of view, this was a premium of 40% over the lodestar. .  
 17 . . But from the contingent-fee point of view, 6.68% of  
 18 past-due benefits was over 73% less than the contracted  
 19 fee and over 60% less than the [already] discounted fee  
 20 the attorney requested. Had the district court started  
 with the contingent-fee agreement, ending with a 6.68%  
 fee would be a striking reduction from the parties' fee  
 agreement. This difference underscores the practical  
 importance of starting with the contingent-fee agreement  
 and not just viewing it as an enhancement.

21 *Id.* at 1150-51.<sup>4</sup>

### 22 III. DISCUSSION

23 As prescribed by *Gisbrecht* and *Crawford*, the Court begins by  
 24 reviewing the contingency fee agreement entered into by Plaintiff  
 25 and his counsel. The contingency agreement states that Plaintiff  
 26 agreed to pay attorneys' fees not to exceed 25% of any past due

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27 <sup>4</sup> The attorneys in *Washington* and *Trejo* were dealt a 23% and  
 28 47% reduction, respectively. *Id.* at 1151 n.9.

1 benefits resulting from his claims. Because Plaintiff was awarded  
2 approximately \$50,450.00 in past due benefits, and because the  
3 requested fee of \$12,612.50 represents 25% of Plaintiff's award, it  
4 is evident that Plaintiff's counsel has submitted a request that  
5 does not exceed the statutory maximum.

6 With respect to the reasonableness of the fee requested, the  
7 Court is satisfied that no down adjustment is warranted. The  
8 character of the representation and the results achieved (\$50,450  
9 in past due benefits) were both good, especially when you consider  
10 the fact that Plaintiff's counsel began working on this case over  
11 six years ago. Moreover, the representation of Plaintiff was  
12 professional, there was no significant delay attributable to  
13 Plaintiff's counsel, and the fee was in proportion to the time  
14 spent on the case and would not result in a windfall to Plaintiff's  
15 counsel. Plaintiff's counsel spent approximately 36 hours on the  
16 two appeals to federal district court. Thus, the effective hourly  
17 rate for the requested fee is approximately \$350.35 (\$12,612.50  
18 divided by 36 hours), which is below many effective hourly rates  
19 that have been approved in this district. *See Ross v. Comm'r Soc.*  
20 *Sec.*, No. 6:10-cv-06410-SI, 2014 WL 2442331, at \*2 (D. Or. May 30,  
21 2014) (collecting cases and making the same observation in  
22 approving a fee request that resulted in an effective hourly rate  
23 of \$380).

#### 24 IV. CONCLUSION

25 For the reasons stated, the Court recommends granting  
26 Plaintiff's unopposed motion (Docket No. 18) for § 406(b) fees in  
27 amount of \$12,612.50, less the \$6,100.00 previously awarded under  
28 the EAJA.

1                                   **V. SCHEDULING ORDER**

2           The Findings and Recommendation will be referred to a district  
3 judge. Objections, if any, are due **July 14, 2014**. If no objections  
4 are filed, then the Findings and Recommendation will go under  
5 advisement on that date. If objections are filed, then a response  
6 is due **August 1, 2014**. When the response is due or filed,  
7 whichever date is earlier, the Findings and Recommendation will go  
8 under advisement.

9           Dated this 25th day of June, 2014.

10                                   /s/ Dennis J. Hubel

11                                   \_\_\_\_\_  
12                                   DENNIS J. HUBEL  
13                                   United States Magistrate Judge